

16 Am. Jur. 2d Constitutional Law § 97

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Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

IV. Construction of Constitutions

C. Effect of Extrinsic Sources

6. Circumstances Attending Adoption of Provisions; Existing Conditions, Laws, and History

§ 97. The Federalist and other contemporary writings considered in construction of constitutional provisions

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 603 to 606

Over the intervening two centuries since the Federalist Papers were written, thousands of references have been made to these papers in judicial opinions considering constitutional questions,¹ and they have often been accorded considerable weight.² The same rule applies to writings about the Federal Constitution's predecessor, the Articles of Confederation.³

For the contemporaneous construction, recourse is occasionally had to other unofficial discussions and expositions,⁴ such as Thomas Jefferson's "wall of separation" letter to the Danbury Baptists which appears to have been given as much respect as anything said in either the Congress or the ratifying conventions that gave us the First Amendment;⁵ and in deciding the proper meaning of the clause authorizing Congress by appropriations "to provide for the general welfare," the Supreme Court looked at great length at the views of both Alexander Hamilton and James Madison.⁶

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Footnotes

¹ Among the many recent cases that could be cited, see [State of Cal. v. U.S.](#), 104 F.3d 1086 (9th Cir. 1997) (on the invasion clause, [U.S. Const. Art. IV, § 4](#)); [Loving v. U.S.](#), 517 U.S. 748, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996) (the Federalist Papers were cited on the question of the separation of powers and the three branches of government); [U.S. Term Limits, Inc. v. Thornton](#), 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d

881 (1995) (Federalist cited on term limits); *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995) (on the right to distribute unsigned handbills); *American Dredging Co. v. Miller*, 510 U.S. 443, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994) (on admiralty jurisdiction and the general maritime law); *Koog v. U.S.*, 79 F.3d 452 (5th Cir. 1996) (on state sovereignty in the federal structure of government); *Federal Election Com'n v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993) (on a prohibition against legislative intrusions into other governmental functions); *Davis v. Fulton County, Ark.*, 884 F. Supp. 1245 (E.D. Ark. 1995), aff'd, 90 F.3d 1346 (8th Cir. 1996) (on the protection from private harms as being entrusted to the states); *McHugh v. Westpac Banking Corp.*, 1995 WL 243339 (N.D. Ill. 1995) (on alienage jurisdiction); *Keeler v. Mayor & City Council of Cumberland*, 928 F. Supp. 591 (D. Md. 1996) (on committing the construction of the United States Constitution exclusively to the courts); *U.S. v. Vargas*, 885 F. Supp. 504 (S.D. N.Y. 1995) (on criminal sentencing); *Canaan Ministries, Inc. v. Town of Cheektowaga*, 7 A.D.D. 84 (W.D. N.Y. 1994) (on a central government of limited and defined powers); *Dutmer v. City of San Antonio, Tex.*, 937 F. Supp. 587 (W.D. Tex. 1996) (on term limits); *West Virginians For Life, Inc. v. Smith*, 919 F. Supp. 954 (S.D. W. Va. 1996) (on the importance of anonymous pamphleteering to freedom of speech and press); *Pacific Merchant Shipping Assn. v. Voss*, 12 Cal. 4th 503, 48 Cal. Rptr. 2d 582, 907 P.2d 430 (1995) (on the Interstate Commerce Clause); *State in Interest of A.C.*, 631 So. 2d 407 (La. 1994), republished at, 643 So. 2d 719 (La. 1994), on reh'g, 643 So. 2d 743 (La. 1994) (on a government of checks and balances); *State v. Haliski*, 140 N.J. 1, 656 A.2d 1246 (1995) (on the meaning to be attached to a congressional failure to act); *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 120 N.M. 562, 904 P.2d 11 (1995) (on the separation-of-powers doctrine); *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513, 1994-Ohio-496, 644 N.E.2d 369 (1994) (on gubernatorial and presidential pardoning and clemency powers).

- 2 2 Loving v. U.S., 517 U.S. 748, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996).
No better authority on the purpose of the provisions of the United States Constitution relating to the federal judicial power can be found than the views of Alexander Hamilton expressed in the Federalist. *Gresser v. O'Brien*, 146 Misc. 909, 263 N.Y.S. 68 (Sup 1933), aff'd, 263 N.Y. 622, 189 N.E. 727 (1934).
- 3 3 Oneida Indian Nation of New York v. State of N.Y., 649 F. Supp. 420 (N.D. N.Y. 1986), judgment aff'd, 860 F.2d 1145 (2d Cir. 1988).
As to the historical importance of the Articles of Confederation, see § 7.
- 4 4 *Washington v. Meachum*, 238 Conn. 692, 680 A.2d 262 (1996).
- 5 5 *Everson v. Board of Ed. of Ewing Tp.*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711, 168 A.L.R. 1392 (1947).
- 6 6 *U.S. v. Butler*, 297 U.S. 1, 56 S. Ct. 312, 80 L. Ed. 477, 102 A.L.R. 914 (1936).

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IV. Construction of Constitutions

D. Construction to Determine Operative Effect

1. As Mandatory or Directory

§ 98. Construction of constitutional provisions as mandatory or directory, generally; presumption

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 619

The courts usually hesitate to declare that a constitutional provision is directory merely since the legislature may tend to disregard provisions which are not said to be mandatory.¹ Accordingly, it is the general rule to regard constitutional provisions as mandatory and not to leave any discretion to the will of a legislature to obey or to disregard them² unless it appears from the express terms thereof or by necessary implication from the language used that they are intended to be directory only.³ The presumption or rule that constitutional provisions are mandatory and prohibitory unless, by express words, they are declared to be otherwise applies to all sections of the state constitution alike and is binding upon all branches of state government.⁴

So strong is the inclination in favor of giving obligatory force to the terms of the organic law that it has even been said that neither by the courts nor by any other department of the government may any provision of the constitution be regarded as merely directory but that each one of its provisions should be treated as imperative and mandatory without reference to the rules distinguishing between directory and mandatory statutes.⁵ Nonetheless, if a constitutional provision contemplates the enactment of implementing legislation, the provision should be interpreted as establishing general guidelines for the forthcoming legislation rather than mandatory directives as to its content absent clear language to the contrary.⁶ If, by reason of unique local conditions, a mandatory constitutional provision serves to confuse rather than to solve the problem with which it is concerned, the consequences must be accepted as inherent in government by law instead of government by edict.⁷

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Footnotes

- 1 J. J. Newman Lumber Co. v. Robertson, 131 Miss. 739, 95 So. 244 (1923); *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363, 53 A.L.R. 821 (1927).
As to the distinction between the mandatory or directory character of a constitutional provision and its nature as self-executing or not self-executing, generally, see § 101.
- 2 *StopAquila.org v. City of Peculiar*, 208 S.W.3d 895 (Mo. 2006).
Essential provisions of a constitution are to be regarded as mandatory. *Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 945 So. 2d 553 (Fla. 1st DCA 2006).
- 3 *In re Advisory Opinion to Governor*, 510 A.2d 941 (R.I. 1986).
As to the effect of particular constitutional language, see §§ 99, 100.
- 4 *Unger v. Superior Court*, 102 Cal. App. 3d 681, 162 Cal. Rptr. 611 (1st Dist. 1980) (disapproved of on other grounds by, *Unger v. Superior Court*, 37 Cal. 3d 612, 209 Cal. Rptr. 474, 692 P.2d 238 (1984)).
State, on inf. of Dalton v. Dearing, 364 Mo. 475, 263 S.W.2d 381 (1954).
- 5 *Pennsylvania State Troopers Ass'n v. Com.*, 145 Pa. Commw. 291, 603 A.2d 253 (1992), order aff'd, 533 Pa. 111, 619 A.2d 1355 (1993).
- 6 *Tishman v. Sprague*, 293 N.Y. 42, 55 N.E.2d 858 (1944).

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